

*United States Court of Appeals
for the Second Circuit*



APPENDIX

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2 Q Did you attend the closing on February 11,
3 1971?

4 A I did.

5 MR. BIEHL: I have no further questions.

6 CROSS EXAMINATION

7 BY MR. GRUTMAN:

8 Q Did you believe you had a meritorious claim
9 against Mr. Gross after consulting with your counsel in
10 California?

11 A Yes, I did.

12 Q Did you press that claim because of your be-
13 lief in the merits of the claim?

14 A That was correct.

15 Q Were you motivated out of vindictiveness
16 against Charles Gross in pressing your claim?

17 A No. The claim was pressed months after this
18 whole thing took place.

19 Q Did you ever engage in a conspiracy with
20 Risher, Kayne, Muh, Berkowitz, Persky, or Finley, Kumble
21 to deprive Charles Gross, Mabel Bleich and Jean Donahue
22 of their capital in Newburger Loeb?

23 A No, I did not.

24 Q Did you ever engage in a conspiracy with some,
25 any, or all of those aforementioned people to bring base-

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2 less claims against them to tie them up in litigation
3 to the end of the world and wear them down by economic
4 attrition?

5 A No.

6 Q Subsequent to the transfer agreement going
7 through February 11th, 1971, did you participate and give
8 of your time in attending some of these arbitration
9 sessions which were held in New York?

10 A Subsequent, yes.

11 Q Did you incur substantial financial expense
12 for the prosecution of those claims in the arbitration
13 after they were transferred to arbitration by the Federal
14 Court in California.

15 A Yes.

16 MR. GRUTMAN: I have no further questions.

17 CROSS EXAMINATION

18 BY MR. SHAW:

19 Q Did you continue to press the litigation
20 after you sold your stock in Newburger Loeb Corporation
21 on or about February 11, 1972?

22 A Yes. If I am not mistaken the first hearing,
23 I think, was either March or April of 1972. The first
24 hearing before the arbitration, that was. That would have
25 been after that date.

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2 Q After February 11, 1972, were you employed
3 by the corporation?

4 A Yes. I was employed as manager of the
5 Century City office.

6 Q For how long?

7 A The office was sold in May of 1974.

8 Q You were employed in the office in California
9 until May of 1974?

10 A That's correct.

11 MR. SHAW: Your Honor, may I inquire of Mr.
12 Mandel how long he will be so I can gage the presence of
13 backup witnesses?

14 MR. MANDEL: Less than an hour.

15 CROSS EXAMINATION

16 BY MR. MANDEL:

17 Q Mr. Sloane, Mr. Persky represented you as an
18 attorney in connection with the transfer agreement; is
19 that correct?

20 A He did not represent me individually, no, sir.

21 MR. MANDEL: I would like to read into the
22 record interrogatory 27 and the answer:

23 Question: In executing the transfer agree-
24 ment, did you personally rely upon the opinion of any
25 attorney as to the legality thereof? If so, please state

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2 the name of such attorney and state whether the opinion
3 you relied upon was written or oral and the date thereof.

4 Answer: Yes. I relied upon Robert Persky
5 of the firm of Finley, Kumble, Underberg, Persky and
6 Roth, and also the fact that there was general agreement
7 among the approximate 15 other attorneys.

8 THE WITNESS. I said I relied upon his opinion.
9 I did not say he represented me.

10 MR. MANDEL: I will now read interrogatory 25:

11 Question: Were you represented by an attorney
12 in connection with negotiations and execution of the
13 transfer agreement? If so, please name each such at-
14 torney.

15 Answer: I was represented by the firm of
16 Finley, Kumble, Underberg, Persky and Roth.

17 BY MR. MANDEL:

18 Q Is that correct?

19 A I was not personally represented. I was re-
20 presented as a member of the corporation. I never
21 personally paid any bills to the firm.

22 Q On February 3, 1975, you swore to the answer
23 which I have just read to the question I have just read;
24 is that correct?

25 A May I see that?

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2 (Pause.)

3 Yes, that's correct.

4 Q When did you first understand that you might
5 have an opportunity to become a stockholder in a corpora-
6 tion to be formed for the purpose of taking over the
7 Newburger Loeb business?

8 A The circumstances surrounding that were
9 basically as follows: I was in California managing the
10 Century City office in December of 1970. Fred Kayne was
11 on vacation at the time, I believe, in Aruba. I was
12 aware that there were problems existing in New York and
13 various attempts were being made to do something to sal-
14 vage either the partnership or form a corporation. I
15 had received some time during this period -- Bob Muh
16 was trying to reach Fred and he called me and asked me
17 if I knew where he could be reached. In the course of
18 the conversation I asked Bob what was happening and he
19 told me that briefly the limited partners, I believe it
20 was at that time, had asked Bob and Paul Risher if they
21 would help out in some kind of restructuring of problems,
22 to the best of my recollection. I told him at that time
23 that if anything does go through and there is a deal
24 consummated, and if Fred is a part of that, I would like
25 to be a part of it. I did not know the details of any

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2 particular deal going through.

3 Q You place that in December?

4 A Either late November or December, somewhere
5 in that period.6 Q Isn't it a fact that in answer to interroga-
7 tories you said your first discussion about being a
8 participant in a group which would acquire all or part
9 of the business of Newburger Loeb & Company was in October
10 of 1970 or November of 1970 and you had that discussion
11 with Fred Kayne?12 A Yes. That answer was based on the first
13 complaint that Mr. Kayne had that never came to fruition.
14 I understood your question to mean my participation in
15 the deal that came to fruition, which was not the same
16 deal.17 Q But at least as early as October you had some
18 idea that there could be an opportunity for you in con-
19 nection with a takeover of the corporation?20 A No. I would not say I looked at it as an
21 opportunity in the sense you mean it. No.22 Q Didn't you recognize that there might be a
23 financial advantage to you, coming out of this proposed
24 corporation?

25 A No, sir.

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2 Q In fact, how many shares did you buy?

3 A 50,000.

4 Q You paid \$10,000 for them?

5 A As it turned out.

6 Q In toto?

7 A Yes.

8 Q You sold those shares in February of 1972?

9 A That's correct.

10 Q How much did you get for those shares?

11 A \$2 a share. I sold 25,000 shares.

12 Q You sold 25,000 shares for 50,000?

13 A That's correct.

14 Q The balance of shares you kept?

15 A That's correct.

16 Q How did it come about that you kept some of
17 your shares when Fred Kayne sold all of his?

18 A To the best of my recollection at the time
19 the sale was being negotiated the buyers had X amount of
20 dollars that they were willing to invest, and there were
21 X number of shares available to be sold. The presentation
22 was made, and at the time of the presentation I was given
23 an opportunity to sell 25,000. I was not told I could
24 sell 50.

25 Q You simultaneously acquired a put with regard

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2 to your remaining 25,000. Is that correct?

3 A Under certain conditions.

4 Q What were those conditions?

5 A To the best of my recollection, if the
6 office I was managing, the Century City office, was sold
7 in other than liquidation of the firm, Newburger Loeb
8 would pay me \$2 a share for my remaining shares.9 Q You testified on direct about your conversa-
10 tion with Charles Gross when you called him at the office
11 of Philip Mandel; is that correct?

12 A Yes, sir.

13 Q That conversation took place on January 15?

14 A That's the date that has been used. I have
15 no reason to doubt it.

16 Q This was about the middle of January, right?

17 A Yes.

18 Q Are you quite definite and positive in your
19 own mind about the accuracy of the account of that con-
20 versation you gave on direct examination?

21 A Yes, I am.

22 Q There is no doubt in your mind?

23 A At the time of the arbitration, when the
24 question was first posed to me out of the blue, I did
25 not recollect a phone call. Subsequently, Mr. Gross, in

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2 his testimony, testified to the phone call, and later
3 in my deposition, I testified to it. After Mr. Gross'
4 testimony, I did a lot of soul-searching because it was
5 a personal attack on me on the kind of phone call I know
6 I do not make. I am convinced I made the phone call,
7 but not that way.

8 Q In the arbitration your testimony was simply
9 that you had no recollection of such a phone call.

10 A That's correct.

11 Q Did you ever correct that testimony in the
12 arbitration?

13 A No, to my recollection.

14 Q You called Mr. Gross at Mr. Mandel's office
15 immediately after you had a conversation with Mr. Kayne;
16 is that correct?

17 A Within a short period of time.

18 Q It was a short enough period of time so that
19 you felt you could still catch Gross at Mr. Mendel's
20 office after the following thing had happened:

21 Persky, Risher, and Muh went downstairs,
22 called Kayne from the lobby of the building, had a con-
23 versation --

24 MR. SHAW: Objection.

25 MR. BIEHL: Objection.

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2 MR. GRUTMAN: Objection.

3 MR. BIEHL: I think the recitation of all
4 those facts is not necessary to the question.

5 MR. SHAW: Objection.

6 THE COURT: Mr. Mandel is endeavoring to get
7 to the speed with which Mr. Sloane called back based on
8 the fact that he called Mr. Mandel's office. I gather
9 that this was with the anticipation that Mr. Gross was
10 still there. He is trying to recite to see whether the
11 witness will acknowledge whether certain things happened
12 with certain speed permitting that assumption to be
13 valid.

14 Overruled.

15 You may go ahead.

16 Q You understood that somebody had left my
17 office and had gone downstairs and made a phone call to
18 Kayne; is that right?

19 A That's correct.

20 Q They had had a conversation with Kayne giving
21 him a report of the meeting?

22 A That's correct.

23 Q Were you present when Kayne had that con-
24 versation?

25 A No.

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2 Q Kayne called you immediately and said he had
3 just spoken to Persky; is that right?

4 A We worked in the same office.

5 Q Kayne immediately turned to you and said he
6 had just spoken to Persky?

7 A I can't say he immediately turned to me. I
8 don't know how much time elapsed between the phone call
9 and his coming in to me.

10 Q You still had the idea that Gross would still
11 be at Mandel's office?

12 A That was the only place I knew I could reach
13 Mr. Gross. Whether he had left or not left, I had no
14 way of knowing.

15 Q You had a conversation with Kayne before you
16 called; is that right?

17 A He told me the facts of Mr. Persky's phone
18 call.

19 Q He told you that Gross and his lawyer were
20 jeopardizing the deal?

21 A No. I don't think that's accurate.

22 Q Didn't you call up Gross to plead with him
23 not to kill the deal?

24 A I called him to plead with him not to let
25 the deal be killed -- not what you said, not for him to

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2 kill the deal, if that's your words.

3 Q You called him up to plead with him to not
4 let the deal be killed?5 A I called him up because I could not under-
6 stand why he would stand in the way of the deal.7 Q Did you say you called him up to plead with
8 him?

9 THE COURT: Yes, he did.

10 Q Did you say anything at all to Mr. Gross
11 during that conversation about litigation?

12 A No, I did not.

13 Q The fact of the matter is that according to
14 your testimony you had already had two conversations or
15 three conversations with Mr. Massing about suing Charles
16 Gross in California.17 A I believe that I testified I didn't know if
18 I had spoken to the attorney at that time or not. I am
19 accepting the January 15th date because it has been of-
20 fered, but in my mind I cannot state for a fact I had
21 met with Mr. Massing at that time.

22 Q You met with him early in January, right?

23 A Some time early in January, to the best of
24 my recollection.

25 Q You met with him again early in January,

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2 right? You met with him twice early in January.

3 A There would have been some days between the
4 two meetings.

5 Q A few days between the meetings?

6 A Yes.

7 Q You made the decision to sue Gross when?

8 A When Mr. Kayne returned from vacation and
9 his wife had completed the operation, we sat down and
10 had our first discussion at that time regarding what we
11 thought our situation was.

12 Q That was early in January?

13 A Or late in December. I can't pinpoint it.

14 Q When did you reach the decision to sue Gross
15 in California?

16 A Our attorneys reached that decision after
17 our meeting with them.

18 I am sorry. In California as opposed to
19 somewhere else?

20 Q I am talking about the California litigation.
21 When did you reach the decision with Mr. Kayne and the
22 attorneys to commence such a litigation?

23 A It would have been some time after the series
24 of meetings with the attorneys.

25 Q Was that before or after your conversation

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2 with Mr. Gross when you called him at Mr. Mandel's office?

3 A I can't pinpoint it as a time.

4 Q You don't know one way or the other?

5 A That's correct.

6 Q You do know, however, that you had met with
7 Massing -- is that his name?

8 A That's correct.

9 Q At least twice early in January?

10 A Some time in that general period.

11 Q Was the decision to sue made in the second
12 meeting, the third meeting, or when?

13 A Not the first meeting. I cannot tell you for
14 certain beyond that.

15 Q The first time you spoke about Massing, about
16 the fact that you may have been or that you were fraud-
17 ulently induced to become a partner in Newburger Loeb,
18 was it April of 1970?

19 A That's not my testimony. I spoke to him in
20 April regarding my personal liability. There was no
21 talk at that time about any fraudulent misrepresentation.

22 Q Do you recall that on the deposition you
23 testified that in April or May of 1970 --

24 Do you have a copy of your deposition?

25 A Is that the first or the second?

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2 Q The first session. I ask you to turn to
3 page 31.

4 A Yes.

5 Q Do you recall --

6 A I am sorry. Is this the first or second?

7 Q January 28, which is thefirst session.

8 A Yes.

9 Q Do you recall there on page 31 of your depo-
10 sition that you told me that you and Mr. Kayne realized
11 that you had entered into the partnership under terms
12 other than actually existed as far as the financial con-
13 dition of the partnership tha the first knowledge came
14 to you either in April or May of 1970?

15 A That's correct.

16 Q Is it fair to say that in the deposition you
17 said you had a conversation with Kayne about this when
18 you were alone in California some time in April or May
19 -- page 33 -- and that you spoke to an attorney at that
20 time?

21 A Yes.

22 Q And that the attorney was Bert Massing, right?

23 A That's correct.

24 Q On page 34 of your deposition you said --

25 A I don't think it is proper. I think you are

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2 leaving out a question that throws the thing out of
3 context.

4 Q Tell me about that.

5 A Line 14:

6 "Question. You were very worried about your
7 potential liabilities?

8 "Answer. Yes.

9 "Question. Did you discuss whether you should
10 speak to an attorney?

11 "Answer. I believe we talked to an attorney."

12 This was regarding my personal liability,
13 not regarding any representation. This is page 33.

14 Q You are telling me that you did not discuss
15 with Mr. Massing in April the question of whether you had
16 any rights or defenses or discussed with him in any way
17 the question of your being brought into the firm by mis-
18 representation?

19 A To the best of my recollection, yes.

20 Q You said that you did not remember whether
21 you and Kayne spoke to Massing alone.

22 A That's correct.

23 Q You said you did not remember whether you
24 spoke to Massing on the phone or at his office.

25 A Yes, sir.

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2 Q Is that still correct?

3 A That's correct. On some social basis.

4 Q You say that in context your testimony on
5 deposition, pages 31 through 35, was that you were only
6 talking to him about your potential liability and not
7 about the fact that you had been brought into the firm
8 by false representations; is that what you say?

9 A Yes.

10 Q You are completely clear about that?

11 A That's my recollection.

12 Q Did you get advice from Mr. Massing?

13 A No. There was no specific advice given.
14 There was no specific question or enough information
15 given to get any kind of advice.

16 Q Did you get general advice from Mr. Massing?

17 A To the best of my recollection, the only
18 advice was everything else being equal there might be
19 some potential liability being a partner in a partner-
20 ship that was suffering losses. There might be some
21 problems.

22 Q Did you need Mr. Massing's advice to let
23 you know that as a partner you could be liable for part-
24 ner's debts?

25 A That was not a case of my calling up to dis-

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2 cuss with him my potential liability. That came about
3 in the course of another discussion or meeting or social
4 event. I obviously had some inkling of it or else I
5 would not have mentioned it. I am not an attorney.

6 Q Did you tell Massing that you had been lured
7 into partnership with false information?

8 A I have no recollection of saying anything
9 like that, no, sir.

10 Q Do you remember that in your deposition you
11 invoked the attorney-client privilege?

12 MR. SHAW: Objection.

13 MR. GRUTMAN: Objection.

14 MR. MANDEL: They can't do that. They in-
15 voked the attorney-client privilege at the deposition
16 and then there was testimony at the trial about meetings
17 with Massing. The least I can do is call that fact to
18 the Court's attention. Actually, I believe I had the
19 right to strike all of that testimony if I chose to do
20 so.

21 MR. SHAW: My understanding is that generally
22 no inference is to be drawn whatsoever from the raising
23 of a privilege. That's the reason we have privilege.
24 It would be an incursion into the existence of privilege
25 to make comment upon it. I don't know what the answer is.

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2 He previously invoked the privilege but is now testifying
3 in that area.

4 THE COURT: Why don't we recess for lunch.

5 (Luncheon recess.)

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2 Afternoon Session, 2:00 p.m.

3 THE COURT: I overrule the question to the
4 objection to the attorney-client privilege.

5 Mr. Mandel, I do not think it will make any
6 difference in the outcome of this case.

7 C H A R L E S . S. S L O A N E , having been recalled
8 as a witness, and having previously been sworn,
9 testified as follows:

10 CONTINUED CROSS EXAMINATION

11 BY MR. MANDEL:

12 Q On your deposition, did you plead the at-
13 torney-client privilege to the contents of your discussion
14 and Mr. Kayne's discussion with Mr. Massing in April
15 of 1970?

16 A I don't think it has ever been determined
17 that Mr. Kayne was there with me to begin with.

18 At the deposition, I gave my recollection of
19 the conversation, and then beyond that we did plead pri-
20 vilege, yes, after giving what I thought was an explana-
21 tion of what took place.

22 Q Is it your testimony that you gave the con-
23 versation in full to the best of your recollection
24 before you pleaded the attorney-client privilege?

25 A Yes.

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2 MR. MANDEL: Your Honor, instead of reading
3 it into the record, may we deem page 31, line 10 to page
4 38 as part of the record? That's the area of the deposi-
5 tion which refers to discussions between Mr. Kayne and
6 the attorney Massing. Mr. Sloane has testified in con-
7 text he was only consulting Massing at that time about
8 his liability as a partner and not about his rights be-
9 cause of the alleged misrepresentations.

10 THE COURT: That's agreeable with me.

11 MR. MANDEL: Page 31, line 10 to page 38
12 line 11 of volume 1 of Mr. Sloane's deposition. That is
13 the deposition taken January 28, 1974.

14 MR. SHAW: Shouldn't we get the entire answer
15 on page 38?

16 THE COURT: Make it line 18.

17 MR. MANDEL: Yes.

18 BY MR. MANDEL:

19 Q Shortly after your discussion on the tele-
20 phone with Mr. Gross at Mr. Mandel's office, did you
21 authorize Mr. Kayne to speak with Mr. Gross about
22 settling a lawsuit?

23 A I was at a meeting that took place when it
24 was discussed, yes.

25 Q When did the meeting with the attorney take

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2 place? Before or after your phone call with Mr. Gross?
3 A To the best of my recollection, this par-
4 ticular meeting was after the phone call.
5 Q Within a day or two?
6 A I cannot place it in that respect.
7 Q Do you accept --
8 A If January 23rd was the correct date of the
9 meeting it was between January 15th and January 21st.
10 Q When was your discussion with Kayne about
11 his going up to try to settle a litigation?
12 A There was a meeting --
13 Q Your discussion.
14 A My discussion between Kayne and myself?
15 There was no discussion.
16 Q How much did you tell Kayne you were willing
17 to settle your share of this three million dollar liqui-
18 dation for?
19 A There was no discussion as to any specific
20 amount on my part.
21 Q By the way, how did you calculate your
22 damages at three million dollars in that litigation?
23 MR. SHAW: Objection.
24 THE COURT: Overruled.
25 A After presenting the attorneys with the facts

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2 of what happened they came up with various categories of
3 damages which they presented to us and I accepted them.

4 Q What were those categories?

5 A \$50,000, which was the out-of-pocket loss
6 actually incurred. I believe one million dollars on the
7 punitive damages, and I believe a sum also of one million
8 dollars on potential liabilities of the partnership, and
9 the third million was for loss of other opportunities
10 during employment by Newburger Loeb.

11 Q You regarded that as a fair and accurate
12 summary of the damages that have been done to you by Mr.
13 Gross' alleged misrepresentation?

14 A Yes, based on a conversation with the attorney.

15 Q Did you say you had put in \$50,000 into the
16 partnership?

17 A What period of time? I paid in more than
18 \$35,000.

19 THE COURT: The time of the conversation
20 with the lawyers.

21 THE WITNESS: At that time I made an initial
22 payment of \$25,000 shortly after signing the partnership
23 agreement. There were a series of payments made from
24 two sources: one was an income tax refund, and there was
25 a series of \$2,000 monthly payments made, but I can't

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2 recall what time those payments began.

3 Q Did you ever pay the full \$50,000?

4 A I believe as of this date there is a balance
5 somewhere in the area of \$4,000 due.

6 Q At least by the time you began the California
7 litigation you had not paid more than \$25,000; is that
8 correct?

9 A I am not certain if I made any of those
10 \$2,000 payments or not. I am not certain when they began.

11 Q Were you in Court when I read Mr. Bamberger's
12 deposition as to what happened on February 11th?

13 A No, I was not.

14 Q Did you attend the meeting between Mr. Persky,
15 Mr. Bamberger, Mr. Risher, and Mr. Muh concerning the
16 fact that Mr. Burak would not sign an opinion letter
17 saying that the transfer agreement was properly authorized?

18 A I have no recollection of any such meeting.

19 Q You were present at the closing on February
20 11, were you not?

21 A Yes, I was.

22 Q You were aware that Mr. Burak refused to sign
23 an opinion letter, were you not?

24 A There was a statement that because of an
25 illness, whoever the senior partner in the firm was, he

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2 was not there and Mr. Burak was not in a position to
3 render the opinion.

4 Q Do you remember Mr. Burak's saying that?

5 A That's my recollection, yes.

6 Q There is no doubt in your mind as to the
7 accuracy of that recollection?

8 A That thought is very strong in my mind.

9 Q Burak said the only reason he could not
10 give an opinion letter was that somebody was sick and
11 he was too young?

12 A I didn't say that. I recollect the statement
13 regarding the fact that somebody was not there and that
14 he was not rendering an opinion letter. I'm not saying
15 that's the only reason.

16 Q Do you remember Mr. Persky saying anything
17 to Mr. Burak?

18 A No, sir.

19 Q You don't remember a meeting between Persky,
20 Muh, Risher, and Bamberger?

21 A Not specifically. I know throughout the
22 whole day there were a series of meetings.

23 Q Do you remember when Burak announced he
24 would not give an opinion and when that fact came out
25 the closing stopped?

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2 A The closing stopped a number of times during
3 that negotiations. I can't recall if it stopped at that
4 time or not. The negotiations stopped, I should say.

5 Q You don't remember whether it stopped because
6 of Mr. Burak's opinion letter?

7 A I would assume it did. I can't say I remember
8 that for a fact.

9 Q Do you remember that Persky volunteered to
10 prepare an opinion instead?

11 A I remember that Persky prepared the opinion
12 letter.

13 Q You don't remember that he volunteered to do
14 it?

15 A No. I can't recall the specific events that
16 led up to his actually doing it.

17 Q I call your attention to page 86 on your de-
18 position on February 1, 1974, session two, line 21. I
19 asked you this question and you gave this answer:

20 "Question. What happened then?"

21 "Answer. I am testifying from being there,
22 my recollection from being there. There was a discussion.
23 Mr. Persky volunteered to make up whatever the wording,
24 make up or prepare the transfer letter. There was no
25 objection."

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2 Do you remember that now?

3 A That's my statement, yes.

4 Q You were aware, were you not, that Gross,
5 Bleich and Donahue were not consenting but objecting to
6 the transfer?

7 A I was aware they were not consenting.

8 Q You knew their attorney had made a claim in
9 the transfer agreement that could not validly be done
10 without their signatures?11 A I can't say that I knew that for a fact,
12 no, sir.

13 Q You had no idea about that?

14 A I can't recollect. I may have or I may not
15 have.

16 Q That was never discussed with you by Kayne?

17 A Not to my recollection.

18 Q By Persky?

19 A No, sir.

20 Q By Bamberger?

21 A Not to my recollection.

22 Q By Risher or Muh?

23 A No, sir, not to my recollection.

24 Q Wasn't it a fact that they were not consenting
25 behind your telephone call on January 15th and behind your

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Sloane/cross

2 idea that they might kill the deal?

3 A I don't think it is fair to say that the
4 fact that they were not consenting was behind my phone
5 call, no, sir.

6 Q Did you authorize the inception of this
7 litigation here in this Court on the Buckley claim against
8 Buckley, Bleich, and Donahue?

9 A In the sense that I understand "authorized"
10 to mean, no. I did not authorize the claim.

11 Q You were a member of the Board of Directors,
12 were you not?

13 A Yes. At that time.

14 Q You knew on February 11th that set offs or
15 claims were going to be asserted so that Gross, Bleich,
16 and Donahue would not have to be paid at once, did you
17 not?

18 MR. SHAW: Objection, your Honor.

19 THE COURT: Overruled.

20 A I can't say for a fact I knew that, no.

21 Q You didn't think about it one way or the
22 other?

23 A Think about what?

24 Q About the fact that Gross, Bleich, and
25 Donahue had capital positions and they were not con-

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2 senting to this transfer agreement.

3 MR. SHAW: Objection. We have two questions
4 in one, and both are very critical questions.

5 THE COURT: Can you feel that with the two
6 in-there?

7 THE WITNESS: I'm not sure which question I
8 will be answering.

9 THE COURT: Sustained as to form.

10 Q On February 11th you knew that certain limi-
11 ted partners were signing the transfer agreement, right?

12 A Yes.

13 Q You knew that in signing the transfer agree-
14 ment they were giving up their right against the partner-
15 ship and taking paper of the corporation instead, right?

16 A Yes, sir.

17 Q You knew that the corporation was assuming
18 all of the liability that the partners or the partner-
19 ship had to Gross, Bleich and Donahue?

20 A Yes. I believe I knew that.

21 Q You knew that Gross, Bleich and Donahue had
22 not signed any paper giving up any of their rights?

23 A I may or may not have known that. I cannot
24 say for a fact I did know that.

25 Q You knew that Bleich and Donahue were limited

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2 partners with capital of \$75,000 each, didn't you?

3 A I knew they were limited partners. I cannot
4 state for a fact I knew the amount of money.5 Q You knew that Bleich and Donahue had limited
6 capital of about \$75,000 each, did you not?

7 A I would assume I knew that.

8 Q What was in your mind on February 11th
9 about what was going to happen to their claim to be paid
10 that \$75,000 each?11 A I thought that after the signing, at the
12 time of the signing, when all the other attorneys agreed
13 to this negotiation and everybody went along with it,
14 that discussions would take place and it would be worked
15 out. I was in California until a day before the meeting,
16 and I left the day after, and I was not aware or a day-
17 to-day basis what was going on as far as discussions,
18 what was happening.19 Q So neither Risher, Muh, Kayne, Persky, or
20 Newburger told you they were going to start an action
21 within a few days on the Buckley claim?

22 A No, sir.

23 Q Nobody told you that?

24 A That's right.

25 Q It came as a complete surprise to you?

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2 A: Yes.

3 Q There was never any discussion of that
4 that you heard about before the action was brought?

5 A Absolutely not.

6 Q But you told Risher, Muh, Persky, and
7 Bamberger that you had an action under way against
8 Gross in California. Right?

9 A No, sir. I never said that.

10 Q You never told it to anybody?

11 A I'm sure I told it to somebody.

12 Q Did you tell it to Risher?

13 A I can't specifically remember.

14 Q Did you tell it to Muh?

15 A I may have. I can't recall if I did or I
16 did not.

17 Q Did you tell it to Persky?

18 A No, sir.

19 Q He was your attorney.

20 A I never considered Persky my personal attorney.

21 MR. MANDEL: I have no further questions.

22 CROSS EXAMINATION

23 BY MR. GRUTMAN:

24 Q Mr. Mandel put a question to you in which
25 he asked this: do you recall that Mr. Persky volunteered

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2 to give an opinion letter which the Rosenman firm de-
3 murred giving?

4 Do you remember that?

5 A Yes.

6 Q Do you have a recollection of the circum-
7 stances of what followed when Mr. Burak refused to give
8 the opinion letter and how it came about that Mr. Persky
9 was the one that prepared it?

10 A No, sir. Other than just general conversa-
11 tion taking place, I don't know.

12 Q Do you know what was said by the other 15
13 sets of attorneys who were present concerning who would
14 supply the opinion letter?

15 A No.

16 Q You can't help us on that?

17 A No.

18 CROSS EXAMINATION

19 BY MR. SHAW:

20 Q I believe you indicated in response to Mr.
21 Mandel's questions that you were initially in contact
22 with an attorney to discuss the issue of your liability
23 and certain leases, correct?

24 A Are you referring to my discussions with
25 Mr. Massing?

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A 3747

2 Q Yes.

3 A It was not specifically on leases. It was
4 just a general position as a partner.5 Q You were concerned about your general
6 liability?

7 A Yes.

8 Q Did there come a time when you had any
9 conversations with Mr. Massing with respect to any
10 liability that you might have on any leases of the
11 partnership?12 A Not unless they came up during our dis-
13 cussion in January regarding the arbitration. Nothing
14 other than that.15 Q Were you a member of the partnership at
16 the time when the lease was executed with respect to
17 the premises in Century City in Los Angeles?18 A At the time of the actual signing of the
19 lease?

20 Q Yes.

21 A I would imagine I was not because I did
22 not become a partner until February. We started
23 working on the office long before that. I assume it
24 was before I was actually a partner.

25 Q Did you assume any liability with respect

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2 to that lease?

3 A In what sense "assume"?

4 Q In the sense of having to pay the rent if

5 the partnership or corporation did not pay it?

6 A No.

7 Q Did there come a time when you were sued in
8 relation to any leases of the partnership or the corpora-
9 tion?

10 A There is some action going on now regarding
11 some of the leases.

12 Q Is there more than one lawsuit?

13 A I know of one that I am certain of, but there
14 may be more. A gentleman from New York has been
15 handling it pretty much.

16 Q Would it be fair to say there is more than
17 one lawsuit in which you are a party and the issue is
18 rent due or claimed to be due upon leases of the
19 partnership?

20 A I believe there is. When you say by name,
21 I am familiar with one.

22 Q Is one of those with respect to the premises
23 at 5 Hanover Place?

24 A Is that -- one of them is Barbro.

25 Q Barbro Realty?

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A 3749

2 A Yes.

3 Q Is that 5 Hanover Square?

4 A I don't know.

5 Q In that lawsuit is an attempt being made
6 to obtain a substantial judgement against you individu-
7 ally?8 A I don't think I can answer that. I don't
9 remember how much the suit is for. I have not seen
10 those papers for some time.

11 Q Who are the other parties to this suit?

12 A I would assume all the people who were
13 partners at the time I was.

14 Q Is Mr. Gross a party?

15 A I can't answer that.

16 Q Do you know if he is a defendant in that suit?

17 A I don't know.

18 Q To the extent that the corporation paid
19 the rent at 5 Hanover Square, was that to your advan-
20 tage?

21 A I would say it was.

22 Q To the extent that the corporation paid any
23 of the liabilities or sums due by the partnership to
24 any creditor, was that to your advantage?

25 A I would assume so.

A 3750
5286

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2 Q If it was to your advantage, wasn't it also
3 to Mr. Gross' advantage?

4 A I would assume so, he being in the same
5 category.

6 REDIRECT EXAMINATION

7 BY MR. BIEHL:

8 Q On the date you spoke with Mr. Gross via the
9 long distance phone, did you have any concern as to what
10 might occur if Gross, Bleich or Donahue did not go along
11 with the transfer agreement?

12 A My concern was that if it started there
13 might be a snowball-type of effect and others might not
14 go along with it. There was concern that that would
15 cause the deal not to go through if other people who had
16 joined in were not going along with it.

17 MR. BIEHL: Thank you.

18 THE COURT: You are excused.

19 (Witness excused.)

20 MR. SHAW: I would like to call Mr. Kayne as
21 a witness with respect to my counter claim.

22 MR. MANDEL: I object.

23 MR. SHAW: Also certain areas where objections
24 were sustained.

25 MR. MANDEL: I believe that counter claims

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2 to counter claims should be deferred until after they
3 have rested on defense.

4 MR. SHAW: That will involve keeping Mr.
5 Kayne here for at least one additional day. I under-
6 stand that he is a widower with two small children.

7 THE COURT: Who is standing in for Mr.
8 Silfen?

9 MR. BIEHL: We have no objection.

10 THE COURT: I will permit him to testify.

11 MR. MANDEL: I have a problem. I am not
12 prepared on the counter claim because I would expect
13 in the normal course for them to rest, and nobody told
14 me before the luncheon recess that Kayne was going to
15 be called.

16 THE COURT: Then I reverse myself.

17 MR. SHAW: I announced on Friday I was
18 going to do this. I recall telling it to Mr. Mandel
19 in the men's bathroom. This is a conversation that
20 you and I specifically had in the men's room. You ob-
21 jected outside to this. It is not true you have not
22 been told.

23 MR. GLATZER: I was present when this was
24 told --

25 THE COURT: That's in the middle of the day.

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2 MR. SHAW: It was discussed last week too
3 at the end of Mr. Sloane's examination and Mr. Kayne's
4 examination I could not ask questions at that point but
5 at that point I could call them as witness.

6 THE COURT: I conclude from what we were
7 saying was that you would have to bring him later in
8 the trial, not that you would call on the same day. He
9 was on the stand this morning. It is almost as if you
10 had taken his testimony when he was here.

11 MR. SHAW: I concluded what I would have to
12 do was to not permit him to go to California. I cannot
13 spend the money involved in transporting him back from
14 California a day or two from now.

15 THE COURT: Mr. Silfen objected to your
16 doing this while he was on the stand. That was as re-
17 cently as this morning. He has hardly gotten off the
18 stand and you want to recall him.

19 MR. SHAW: Mr. Silfen has no objection to
20 that as long as it is part of my case.

21 THE COURT: It works a hardship in his cross
22 examination.

23 I would be prepared to let you do this if
24 provision could be made to get Mr. Kayne back here for
25 Mr. Mandel's cross examination, but I will not dis-

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2 advantage a man in his cross examination. You know
3 that as well as I do.

4 MR. SHAW: Mr. Mandel knew at some point
5 in this week, some point, when Mr. Sloane and Kayne
6 would be finished testifying, he would be asking
7 questions on my counterclaims.

8 THE COURT: I didn't get that impression.
9 I got the contrary impression. Mr. Silfen felt this
10 should go in without any of this coming at all. We
11 could have done this this morning. Mr. Silfen raised
12 objections to this. This is tweedledum and tweedledee.
13 I could have overruled the objection this morning and
14 let you do it except for Mr. Silfen's position. I
15 don't think it has changed. It is a matter of two or
16 three hours at this point.

17 MR. SHAW: I am afraid --

18 THE COURT: The answer is Mr. Mandel tells
19 me he is not ready to cross examine on this aspect of
20 the case. That's what he says.

21 MR. SHAW: He has known since last week that
22 Mr. Sloane or Mr. Kayne -- and I am not going to call Mr.
23 Sloane, Mr. Kayne will be called by me --

24 MR. MANDEL: I did not understand until
25 this luncheon recess that Mr. Shaw was prepared to call

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2 Mr. Kayne on the counter claims to the counterclaims.

3 MR. SHAW: Today as opposed to tomorrow?

4 I don't understand that.

5 MR. MANDEL: If it were done tomorrow I
6 could prepare tonight on that, but I certainly did not
7 understand last week, Mr. Shaw, that you proposed to
8 call Mr. Kayne as a witness on the counterclaims to the
9 counterclaims.

10 MR. SHAW: That was said. I said that over
11 and over and over again, that I wanted to examine both
12 of these individuals with respect to the counterclaims
13 to counterclaims. I told you the precise areas in which
14 I wanted to call them. It is foolish to think that what
15 I would do is let them go back to California and bring
16 them back. It is to everybody's interest to have these
17 people return to California as quickly as possible.

18 THE COURT: Mr. Silfen, what do you say to
19 all of this?

20 MR. SILFEN: I would like to make my po-
21 sition on this, what my position was and what it con-
22 tinues to be. I conveyed this to Mr. Shaw.

23 I told Mr. Shaw that to the extent that Mr.
24 Shaw had any inclination to use Mr. Kayne during the
25 course of the defense to the claims of Mr. Gross that I

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2 would object; that as far as I was concerned Mr. Kayne's
3 testimony should come in only with respect to the allega-
4 tions that were made against him as to Gross. That's
5 why I have objected that this was outside the scope of
6 the direct, and what have you. Mr. Shaw alluded to the
7 fact last week that if that be my position he would have
8 to keep Mr. Kayne here. Those were his words on the
9 record to this court. It led me to believe that Mr.
10 Kayne had two alternatives. Either he could be sub-
11 poenaed and be compelled to stay, or if Mr. Shaw made a
12 direction or request to the Court for you to keep Mr.
13 Kayne here, that Mr. Kayne would either be under subpoena
14 to be here or might be directed to testify.

15 When Mr. Kayne completed his testimony today
16 in this Court, I told Mr. Shaw on Friday when he called
17 me that it was my intention, and Mr. Biehl's intention,
18 to call Mr. Sloane next, and I would continue to resist
19 any attempt made by Mr. Shaw to utilize Mr. Kayne out
20 of the context of our defense.

21 Mr. Shaw agreed with me that he would not
22 attempt to keep Mr. Kayne on the stand to use him as a
23 witness in his case.

24 Your Honor now knows Mr. Kayne came off the
25 witness stand. I objected even as late as this morning

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2 to any attempt to use Mr. Kayne as part of Mr. Shaw's
3 case. Mr. Sloane went on and has come off. You can
4 see by the baggage in the back that Mr. Kayne and Mr.
5 Sloane had intended to return to California this after-
6 noon. That was the extent of anything that I said to
7 Mr. Shaw about when Mr. Kayne and Mr. Sloane could be
8 used.

9 They had no intention of voluntarily sub-
10 mitting themselves to testimony, and to the extent that
11 Mr. Shaw told me that as far as he was concerned they
12 could come off and on today since they were here, I ob-
13 viously was not in a position to resist. They are in
14 the courtroom. There is no specific agreement that they
15 will come back again. In fact, their thoughts were
16 candidly to the contrary. That's the extent of my full
17 disclosure.

18 MR. SHAW: Do you have any objection to
19 your client getting on the witness stand and testifying
20 with respect to the counterclaim against the counterclaim ?

21 MR. SILFEN: He is here. Even if I did
22 object you have a way of getting him up here.

23 THE COURT: When would you be prepared to
24 cross examine?

25 MR. MANDEL: Tomorrow morning, your Honor.

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2 THE COURT: Put him on now and cross ex-
3 amination will start at 10 o'clock in the morning.

4 MR. SILFEN: That won't work unless he is
5 under subpoena of this Court. His daughter is ill. He
6 has been out for three weeks.

7 MR. SHAW: I will not call this man. I
8 will be decent.

9 At this time I would like to read some
10 deposition in evidence. I have a witness coming at
11 three o'clock.

12 Robert L. Stern, Sanford Roggenburg, Harold
13 J. Richards, Richard D. Stern.

14 MR. GRUTMAN: While we are doing that --

15 MR. MANDEL: I don't see how we can read
16 in the depositions of defendants against us.

17 MR. SHAW: Let's do it party by party.
18 There was a different reason for each party, rather
19 than doing it en masse. I think it will be much more
20 orderly.

21 The first one is Robert L. Stern, and he
22 resides outside of 100 miles from this Courthouse.

23 MR. MANDEL: It makes no difference. The
24 deposition of an adverse party may not be used against
25 my clients. He is not a witness. He is a party. He

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2 is an adverse party.

3 MR. SHAW: Insofar as I am concerned, he is
4 not my party or client. He is a partner. Robert L.
5 Stern is outside of the jurisdiction. He cannot be
6 reached by subpoena. I have no control over him. Mr.
7 Moss does not indicate he is going to be called. I
8 need this person's testimony for my case insofar as the
9 corporation is concerned. His deposition was taken on
10 notice. I believe, although I am not positive about
11 this, that a portion of his deposition may have been
12 read in evidence.

13 MR. MANDEL: I don't think so.

14 MR. SHAW: I would like to read certain por-
15 tions of Mr. Stern's deposition.

16 THE COURT: Mr. Mandel, what is the basis
17 of your objection?

18 MR. MANDEL: The deposition of a party may
19 only be used by the other side.

20 THE COURT: Let's keep it in mind now he may
21 well be for this purpose a witness. Rule 32-A-3 speaks
22 of a deposition of a witness whether or not a party. It
23 may be used for any person if certain basic criteria are
24 met.

25 MR. MANDEL: His deposition was taken as that

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2 of a party only and not as a witness, and in taking the
3 deposition --

4 MR. SHAW: This is Mr. Mandel's deposition.

5 MR. MANDEL: Yes. It is a deposition I took
6 in discovery of an adverse party. I don't believe that
7 the rules countenance having statements made that way
8 brought in and not being subject to cross examination
9 on my part here just because the man is in Washington,
10 D.C. rather than in Manhattan.

11 THE COURT: Do you acknowledge that sub-
12 section 3 speaks of the deposition of a witness, whether
13 or not a party?

14 MR. MANDEL: Yes.

15 THE COURT: That means that even though he
16 may be a party he may also be treated as a witness, if
17 you meet the other criteria.

18 MR. MANDEL: I am not sure of that. I
19 frankly acknowledge I have not researched this question.

20 Outside of looking at the bare bones of the
21 rule here, I have nothing but instinct to guide me. I
22 think before we take such deposition testimony we ought
23 to at least have a look at Moore's Federal Practice or
24 something of that nature. I think that is inherently
25 prejudicial to allow a party who is able to come here to

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2 testify by deposition to testify by deposition and avoid
3 cross examination. I think it is unfair to allow any
4 other party on his side to use a deposition that way.

5 Your Honor knows in discovery we look for
6 all kinds of material which we might be careful of if
7 we knew we could never cross examine.

8 THE COURT: Is there any question but what
9 this first witness is more than 100 miles?

10 MR. SHAW: Mr. Mandel has himself said that
11 he is in Washington, D.C.

12 THE COURT: I am going to permit it. If
13 overnight you have some basis for asking me to strike it--

14 MR. MANDEL: One further caveat. Is this
15 now part of the counterclaim to the counterclaim evidence
16 or part of the defense, because the defense would rest
17 before we get into the counterclaim to the counterclaim.

18 MR. SHAW: My impression, with respect to
19 all of the depositions is that it relates to not only
20 the defense, but in some respects to the counterclaims
21 to the counterclaims. If Mr. Mandel would like me to
22 preface the reading of certain portions, that it re-
23 lates to one category or the other, I think it would
24 be unnecessary, but I would be glad to do so. I don't
25 think we need it. The depositions fall in both areas.

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2 MR. MANDEL: I believe that the proper way
3 to handle this is for the defense to be concluded with
4 its material --

5 THE COURT: We are non-jury here.

6 MR. SHAW: If we do it as Mr. Mandel sug-
7 gests, it is the first time --

8 THE COURT: It is complicated to do it that
9 way.

10 MR. MANDEL: I am afraid we will be creating
11 confusion otherwise.

12 THE COURT: I trust not, and if it is
13 created, I am sure you will help to dispel it.

14 MR. MANDEL: I personally do not know as to
15 where Robert Stern lives except what I have heard. I
16 think we should at least have a representation on the
17 record that he lives in Washington.

18 MR. SHAW: Mr. Moss has told me that Mr.
19 Abrams of his firm has dealt with Mr. Robert L. Stern,
20 but Mr. Moss knows that he has written to him in
21 Washington.

22 Do you so represent?

23 MR. MOSS: I never spoke to him personally.

24 MR. SHAW: But you know the correspondence
25 was addressed to Washington, D.C.?

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2 MR. MOSS: Yes, so I believe. I never
3 dealt with him.

4 THE COURT: Accepting these things as I
5 do, Mr. Moss, would you, between now and tomorrow,
6 verify that fact so that the record is clear?

7 I will go ahead on that basis, and if the
8 evidence is to be stricken, it will be stricken.

9 MR. MANDEL: I think this may be the only
10 deposition where the party lives outside --

11 MR. SHAW: We also have Richard Stern who
12 lives in Cincinnati.

13 Leo Stern is, of course, dead.

14 Sanford Roggenburg --

15 MR. GRUTMAN: He is alive. Adolphus is dead.

16 MR. SHAW: In the meantime, the witness
17 who was supposed to arrive at three o'clock has come
18 into the courtroom and despite all this talk that we
19 have had I wonder if we could save time by coming to
20 the depositions after the witness is completed.

21 THE COURT: Mr. Moss, maybe you could make
22 a phone call during the afternoon recess.

23 E D M U N D M. R U B I N, called on behalf of New-
24 burger Loeb & Company, having been duly sworn,
25 testified as follows:

